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No. 385

In the Supreme Court of the United States

October Term, 1959

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UNION PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE WESTERN PACIFIC [RAILROAD] COMPANY; and BAMBERGER RAILROAD COMPANY,

Petitioners,

vs.

STRUCTURAL STEEL AND FORGE COMPANY; THE AMERICAN FOUNDRY AND MACHINE COMPANY; ISLAND RANCHING COMPANY; CALVIN L. RAMPTON; and PUGSLEY, HAYES, RAMPTON & WATKISS, a Partnership,

Respondents.

o——o——o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

o——o——o

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In the Supreme Court of the United States

October Term, 1959

UNION PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE WESTERN PACIFIC [RAILROAD] COMPANY; and BAMBERGER RAILROAD COMPANY,

Petitioners,

vs.

STRUCTURAL STEEL AND FORGE COMPANY; THE AMERICAN FOUNDRY AND MACHINE COMPANY; ISLAND RANCHING COMPANY; CALVIN L. RAMPTON; and PUGSLEY, HAYES, RAMPTON & WATKISS, a Partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on July 8, 1959.

OPINIONS BELOW

The United States District Court of Utah rendered no opinion. The opinion of the Circuit Court of Appeals, not yet reported, is printed in the Appendix *infra*, pp. 26-33.

JURISDICTION

The judgment of the Circuit Court of Appeals, printed in the Appendix, *infra*, p. 34, was entered on July 8, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1). *Gay v. Ruff*, 292 U. S. 25; *Aetna Casualty Co. v. Flowers*, 330 U. S. 464.

QUESTIONS PRESENTED

This Court's decision in *Public Service Commission of Utah v. United States*, 356 U. S. 421, concluded:

> "The judgment of the District Court is reversed and the cause is remanded to that court with instructions to set aside the order of the Commission and remand the cause to the Commission for further proceedings in conformity with this opinion."

The District Court had sustained the validity of an order issued by the Interstate Commerce Commission,[1] under Section 13(3) and (4) of the Interstate Commerce Act, requiring petitioners and other Utah railroads to increase their intrastate freight rates in Utah by 15 per cent to remove unlawful discrimination against interstate commerce. The increased rates were in effect from June 22, 1956, until August 27, 1958, when the District Court entered final judgment in conformity with the mandate of this Court, setting the order aside and remanding the cause to the Commission for further proceedings in conformity with the opinion of this Court. Meantime, petitioners had collected from all Utah intrastate shippers, including respondents, some $4,000,000 under the rates as prescribed by the Commission's order. The Commission has conducted and now has pending its decision and order in the further proceedings ordered by this Court.

On August 28, 1958, Thermoid Western Company and four other Utah intrastate shippers brought a class action in the Utah state court against petitioners to recover amounts alleged to have been paid during the time the Commission's order was effective. The complaint alleged that the Commission's order was void; that the rates and charges collected thereunder were "unlawful

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1 The order is set out at pages 130-132 of the Record in this Court, No. 15, October Term, 1957, *Public Service Commission of Utah, et al.* v. *United States, et al.*

and illegal" to the extent they were in excess of rates on file with and approved by the Public Service Commission of Utah, and prayed for judgment in the amounts of the excess. (Transcript of Record, 5-10.)

Petitioners, alleging that the cause of action arose under an Act of Congress regulating commerce, and was a civil action of which United States District Courts have original jurisdiction, removed that action to the same federal District Court which had previously sustained the validity of the Commission's order (Tr. 1). On October 31, 1958, the District Court denied respondents' motion to remand (Tr. 15-16), and granted petitioners' motion to defer trial pending the Commission's final decision and order in the further proceedings ordered by this Court (Tr. 15-16).

Notwithstanding these proceedings and orders of the District Court, the same counsel who had brought the removed Thermoid action brought the instant class action against petitioners on November 10, 1958, in the Utah state court on behalf of respondents herein and other Utah intrastate shippers similarly situated, to recover alleged excessive rates collected under the same Commission order, which the complaint in this action purposely avoided mentioning (Tr. 23-26).

Upon petitioners' supplemental and ancillary petition in the Thermoid case (Tr. 16-23) the District Court issued an injunction restraining respondents and their counsel from prosecuting this action in the Utah state court (Tr. 26). From that injunction respondents appealed to the Circuit Court of Appeals, Tenth Circuit, which held that both complaints stated claims "on which relief can be granted under the laws of the State of Utah"; that the Thermoid case was improperly removed and the District Court was therefore without jurisdic-

tion to issue the injunction; and reversed and remanded the case to the District Court with directions to grant the motion to remand (App., *infra*, pp. 26-33).

The questions presented are:

1. Whether the Court of Appeals erred in holding that the Thermoid case was improperly removed to the federal District Court, and that the court was therefore without jurisdiction to enjoin respondents from prosecuting the instant case in the State court.

2. Whether the Court of Appeals erred in holding that federal jurisdiction was lacking because that court concluded that the complaints "state a claim on which relief can be granted under the laws of the State of Utah."

3. Did the federal District Court, which had upheld the Commission's order, have jurisdiction of claims for restitution of intrastate freight rates prescribed by an order of the Commission under Section 13(3) and (4) of the Interstate Commerce Act, requiring that such rates "shall be observed while in effect * * *, the law of any State or the decision or order of any State authority to the contrary notwithstanding," and were collected by petitioners until the District Court, upon mandate of this Court, set the order aside and remanded the cause to the Commission for further proceedings.

4. Did the claims for restitution of intrastate rates prescribed by and collected in compliance with the Commission's order issued under Section 13(3) and (4) of the Interstate Commerce Act arise under "any Act of Congress regulating commerce."

5. Whether the Court of Appeals erred in holding that "[j]urisdiction wise, our case is wholly unlike"

Atlantic Coast Line v. Florida, 295 U. S. 301, in which this Court asserted jurisdiction and denied identical restitution claims filed in the federal District Court which had upheld the Commission's intrastate rate order.

6. Whether the Court of Appeals erred in holding that the fact that the intrastate rates against which restitution is sought were prescribed by the Commission under the Interstate Commerce Act, Section 13(3) and (4), was irrelevant "as a basis for the charges" sought to be recovered and "was not an essential ingredient of the claims for restitution," and "will not suffice to confer federal court jurisdiction."

7. Whether the Court of Appeals erred in holding that, since the Commission order was later set aside, respondents had "the right" [even while the order was in effect] "not to be required to pay a higher rate on intrastate shipments than that prescribed by applicable state law, rule or regulation."

8. Whether, during the time the Commission's order and the intrastate rates it prescribed were in force and on file with the Utah commission, any Utah law was legally applicable, or any State-approved rates could legally be "on file *and in effect at the time*" (italics added) (Utah Code 1953, section 54-3-7) the Commission-prescribed rates were collected.

9. Whether, to the extent that it based its decision and judgment upon its observation that any final order establishing rates by the Commission in the further proceedings ordered by this Court "may very well be prospective in effect, leaving the subject matter of these actions unsupported by any valid order," the Court of Appeals misconstrued and acted contrary to this Court's decisions in *Atlantic Coast Line v. Florida*, 295 U. S.

301, and *United States v. Morgan*, 307 U. S. 183 and 313 U. S. 409, and, thereupon, erred in ordering the District Court to remand the case to the State court, thus permitting respondents to circumvent effects, potentially adverse to them, of the further Commission proceedings by forcing restitution without awaiting final outcome of those proceedings.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. § 13(3) and (4), and cf. 28 U.S.C.A. § 1337 and 1441(a) and (b) are set out in the Appendix, *infra*, pp. 23-25.

STATEMENT

The controversy of which this petition seeks review emerges in consequence of this Court's decision and mandate in *Pub. Service Comm'n v. United States*, 356 U. S. 421, reversing and directing the United States District Court for the District of Utah to set aside an order of the Interstate Commerce Commission under Section 13(3) and (4) of the Interstate Commerce Act prescribing increased intrastate railroad rates in Utah to remove unjust discrimination against interstate commerce caused by Utah intrastate rates.

The following quotation from the opinion of the Court of Appeals (App., *infra*, pp. 26-33) is a succinct statement of the facts upon which that Court's opinion and judgment are based:

> "This is an appeal from an order of the District Court enjoining appellants, Utah intrastate shippers, from prosecuting a state court class action against appellee railroads, to recover intrastate freight charges paid under an order of the Interstate Commerce Commission, which was ultimately vacated for further proceedings. See Public Service Commission of Utah v. United States, 356 U. S. 421.

"The challenged stay order was entered in a removed action by other shippers similarly situated but with separate and distinct claims. * * *

"The matter is presented on these relevant facts. Pursuant to a proceedings under Section 13(3) (4) of the Interstate Commerce Act, the Interstate Commerce Commission granted a 15 per cent increase in intrastate freight rates to railroads operating in Utah in conformity with the general level of interstate rates over the same routes. See Utah Intrastate Freight Rates & Charges, 297 I. C. C. 87. The Commission's order was sustained by a three-judge court in Public Service Commission of Utah v. United States, 146 F. Supp. 803, and the increased rates were thereupon put into effect. On appeal, however, the rate order was set aside and the cause remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion of the court. Public Service Commission of Utah v. United States, supra. Thermoid Western Company and four other similarly situated intrastate shippers thereupon brought a state court class action against the appellee railroads to recover various amounts alleged to have been paid by them pursuant to and during the time the order of the Interstate Commerce Commission was effective to increase intrastate rates in Utah.

"The complaint alleged the order of the Interstate Commerce Commission increasing intrastate rates in Utah and its ultimate reversal by the Supreme Court on the grounds of insufficiency of the evidence to warrant Interstate Commerce Commission jurisdiction of intrastate rates in Utah. It was then alleged that the order of the Interstate Commerce Commission raising intrastate rates in Utah was void; that any freight rates and charges assessed and collected by the appellee carriers from the plaintiff shippers in intrastate commerce in Utah over and

above those prescribed by the tariff filed with and approved by the Public Service Commission of Utah were unlawful. The plaintiff shippers prayed accordingly.

"The railroad defendants timely removed the action to the United States District Court of Utah on their allegation to the effect that the action arose under an act of Congress regulating commerce, and as such was a civil action or proceedings of which the District Court had original jurisdiction. The motion to remand was denied and the trial of the case was 'continued without date pending outcome of proceedings before the Interstate Commerce Commission.'

"Thereafter the appellant Structural Steel and Forge Company and other similarly situated intrastate shippers, brought the class action in the Utah state court, the prosecution of which was enjoined by the order in the removed Thermoid case, from which this appeal is taken. The suit was against the same railroads to recover rate charges assessed and collected under authority of the vacated order of the Interstate Commerce Commission as in the removed case. Without making any reference to the order of the Interstate Commerce Commission, the complaint merely alleged that the rates charged and collected while the order of the Interstate Commerce Commission was in effect were in excess of those provided in the schedules of the defendant railroads on file with the Public Service Commission of Utah and therefore excessive and illegal, and that the complainants were entitled to recover such excessive charges.

"Without attempting to remove the latter action to the federal court, the railroads in the removed case moved to enjoin the parties from prosecuting the state court action, on the grounds that the attorneys in the removed action had also filed the sub-

sequent class action in the state court and had threatened to file numerous like suits; that said suits were 'unnecessary, vexatious, burdensome, and would cause defendants irreparable damages in expenses they would necessarily have to incur in defending such action, and would circumvent, impair and render futile the jurisdiction of this court in the instant case.'

"Upon statement of counsel, the court seemed to think that the filing of the state court litigation as a class action with an invitation to other parties similarly situated to intervene, was a plan and scheme to frustrate federal court jurisdiction. These considerations apparently prompted the court to enter the challenged injunctive order. At the bar of the court, and by subsequent pleadings, the appellants have waived any defect in service and entered their appearance in the action for the purpose of testing the jurisdiction and propriety of the court to enjoin the state court litigation."

REASONS FOR GRANTING THE WRIT

This case presents, in a new form, claims of shippers for restitution of funds collected by railroads under intrastate freight rates prescribed by order of the Interstate Commerce Commission, between the time a three-judge District Court sustained the order and the time this Court set the order aside and remanded the cause to the Commission for further proceedings, which are still pending final decision and order of the Commission. Such claims heretofore have been made in the same District Court which originally sustained the order, but here, in an apparent effort to escape an adverse decision by this Court in *Atlantic Coast Line v. Florida*, 295 U. S. 301, and probable adverse results of the further Commission proceedings, by recovering the funds before those proceedings can be finally concluded, shippers have

filed five suits in the Utah state court.[2] All were removed by petitioners to the District Court except the instant case.

In reversing the District Court's denial of the motion to remand the Thermoid case and its issuance of the injunction in the instant case, the Court of Appeals held (1) that there was no federal jurisdictional basis for removal of the Thermoid case because the complaint "state[s] a claim on which relief can be granted under the laws of the State of Utah"; (2) that the fact that the rates against which restitution was sought were prescribed by order of the Interstate Commerce Commission "was not an essential ingredient of the claim for restitution" and the mention of the order in the complaint did not suffice to confer federal jurisdiction; and (3) that "[j]urisdiction wise, our case is wholly unlike Atlantic Coast Line v. Florida [*supra*], * * * where restitution was sought in a federal court with conceded jurisdiction to review the administrative rate-making process." These holdings conflict with decisions of this Court and other federal courts in an important area of judicial administration. They should be reviewed by this Court.

I.

The holding of the Court of Appeals that the District Court which had previously upheld the Commission's order lacked federal jurisdictional basis for removal of the Thermoid case because the complaint "state[s] a claim on which relief can be granted under the laws of the State of Utah," is so patently erroneous

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Thermoid Western Co., et al.	$ 6,109.14
Structural Steel & Forge Co., et al.	7,257.85
Buehner Block Co.	18,973.83
Columbia Iron Mining Co.	10,553.97
United States Steel Corporation	2,634,739.52
Total	$2,677,634.31

as to be in the very teeth of the statutory jurisdictional and removal provisions, 28 U.S.C.A., §§ 1337 and 1441(a) and (b).[3]

The test of removability is not whether the relief prayed "can be granted" by the State court; instead, it is whether the federal District Court had "original jurisdiction," and Section 1337 expressly confers that jurisdiction of a civil action arising under "any Act of Congress regulating commerce." If the action in the State court is within original jurisdiction of the federal District Court, then, under Section 1441, it (a) "may be removed by the defendant," and, if founded on a claim arising under the Constitution, treaties or laws of the United States, the action (b) "shall be removable without regard to the citizenship or residence of the parties. * * *"

Therefore, contrary to the view of the Court of Appeals, the fact that the relief prayed "can be granted" by the State court can not be made a reason for holding

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3 Removability of the Thermoid case rests upon the following provisions of U.S.C.A., Title 28:

§ 1337. Commerce and anti-trust regulations

The district courts shall have *original jurisdiction* of any civil action or proceeding arising under *any Act of Congress regulating commerce* or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931. (Italics added.)

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. (Italics added.)

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or *laws of the United States* shall be removable without regard to the citizenship or residence of the parties. * * * (Italics added.)

that a case was improperly removed. The Court of Appeals cites no decision which supports this holding, and we have found none—undoubtedly because no court heretofore has construed the removal acts as to make them unavailing for removal from State courts because those courts have jurisdiction.

The holding is in square conflict with the language of the removal provisions, and with decisions of this Court from the earliest days. For example, in *Insurance Company v. Morse*, 20 Wall. (87 U.S.) 445, (1874), this Court, speaking of the removal statute, held at page 454:

> "It confers an unqualified and unrestrained right to have the case transferred to the Federal courts upon giving the security required. * * * no power of action thereafter remained in the State court, * * *."

Again at page 458, the Court held that citizens are secured "an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789." And the Court went on to hold that a state statute which obstructed this right was "repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void."

The holding of the Court of Appeals is equally obstructive of the absolute right of removal and repugnant to the statutory provisions conferring the right.

Moreover, the Court of Appeals was further erroneous in holding that the Thermoid complaint stated a claim on which relief "can be granted under the laws of the State of Utah, i. e., the right not to be required to pay a higher rate on intrastate shipments than that prescribed by applicable state law, rule or regulation." It is not that simple.

While the Utah Code, 1953, section 54-3-7, upon which the Thermoid group and respondents purport to base their claims, prohibits a railroad from collecting greater or less or different rates than the rates "specified in its schedules on file and *in effect at the time*" (italics added) the transportation service was performed, the fact is there were no intrastate rates "prescribed by applicable state law, rule or regulation" on file with the Utah commission and "in effect at the time" the service was performed.

The only intrastate rates legally on file and *in effect* during the time restitution is claimed were the rates prescribed by the order of the Interstate Commerce Commission under Section 13(4) of the federal Act. Those were the rates collected and there is no claim that respondents paid greater or different rates. Those rates necessarily superseded, nullified and rendered ineffective any previously applicable Utah law and all rates prescribed by Utah under its laws, rules or regulations, and on file with the Utah commission. Section 13(4) empowers the Commission, upon finding that intrastate rates cause any unjust discrimination against or undue burden upon interstate commerce, to prescribe the rate or charge it deems necessary to remove such discrimination or burden; and then expressly provides that—

> "Such rates * * * shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

This Court held in *Atlantic Coast Line v. Florida*, 295 U. S. 301, 311, that while the Commission's order was in force—

> "The carrier was not at liberty to take the law into its own hands and refuse submission to the order

without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path. See, e. g., Interstate Commerce Act, 49 U.S.C., § 16 (8) (9) (10) (11). Obedience was owing while the order was in force."

Therefore, while the Commission's order was in force, respondents and other Utah shippers had no right to rates made under Utah laws, for State-created rights were suspended and federally created rates, rights and obligations substituted for rights to rates under previously applicable Utah law. Utah laws create no right to restitution of federally made intrastate rates.

II.

The decision of the Court of Appeals conflicts with decisions of this Court and other federal courts, in holding that the fact that the intrastate rates, against which restitution is sought, were prescribed by the Interstate Commerce Commission under an Act of Congress was irrelevant, "was not an essential ingredient to the claim for restitution" and would not suffice to confer federal court jurisdiction.[4]

This holding is in square conflict with this Court's decision in *Atlantic Coast Line v. Florida*, 295 U. S. 301. In that case, as in this, (a) the Commission, under Section 13(4) of the Interstate Commerce Act, ordered increased intrastate rates on logs to remove unjust discrimination against interstate commerce caused by State-approved rates; (b) a three-judge federal court sustained the order and the carrier began collecting the higher

4 This erroneous holding is the logical consequence of the court's earlier error in holding that where a complaint filed in a State court states a claim on which relief can be granted under the laws of the State, there is no jurisdictional basis for removal to a federal court.

Commission-prescribed intrastate rates; (c) on appeal this Court, holding that the part of the order relating to unjust discrimination against interstate commerce was not supported by adequate findings and "must be set aside," reversed the District Court.[5]

After the District Court set aside the order and the State-approved rates were restored, the shippers petitioned the District Court for a "decree of restitution" of the difference between the higher rates paid under the Commission order and the lower State-approved rates that would have been paid if there had been no Commission order.

The District Court refused restitution on the basis claimed, but ordered restitution to the extent of 34% of the amount claimed (295 U. S. 308). This Court reversed and ordered the District Court to dismiss the claims.

The case was argued twice in this Court, the reargument being called by the Court upon the following questions (295 U. S. 304):

> "(1) Whether the District Court had jurisdiction to award restitution or should exercise such jurisdiction in a case of this character relating to intrastate rates. (2) If the District Court had such jurisdiction and should exercise it in a case of this character relating to the revenue needs of the carrier, what

5 In neither the *Florida* case nor the instant case did the Court hold the order "void." In the *Florida* case the Court merely held that the order must be set aside and did not order the cause remanded to the Commission. In the instant case the Court not only directed the District Court to set the order aside but to "remand the cause to the Commission for further proceedings in conformity with this opinion" (356 U.S. 429). The Commission has conducted the further proceedings which are now pending decision and order by the Commission.

should be the measure of an award of restitution. And (3) In such an inquiry, what effect, evidentiary or otherwise, should be attributed to the proceedings before, and findings of, the Interstate Commerce Commission."

Thus, after calling for reargument on the specific question whether the District Court had jurisdiction, this Court, after discussing at length the merits of the restitution claims and holding that they should have been rejected altogether, reversed and remanded the case with instructions to dismiss the claims. Therefore, it must be presumed that this Court was of opinion that the District Court had jurisdiction of the restitution claims (see *United States v. Corrick*, 298 U. S. 435, 440). Although the further Commission proceedings ordered by the remand of this Court in the instant case have not yet been finally concluded, as they had been in the *Florida* case (295 U. S. 307) before this Court rejected the restitution claims, and no removal from a State court was involved in that case, we submit that this Court's decision on those claims necessarily sustains the jurisdiction of the District Court in this case, which previously upheld the Commission's order, to entertain and adjudicate the restitution claims upon removal, and that therefore the Court of Appeals was wrong in holding that "[j]urisdiction wise, our case is wholly unlike Atlantic Coast Line v. Florida". (App., *infra*, p. 32.)

In holding that the fact that the intrastate rates were prescribed under an Act of Congress was not an ingredient of the restitution claims and did not confer federal jurisdiction, the decision of the Court of Appeals is also in conflict with this Court's decision in *Louis. & Nash. R. R. Co. v. Rice*, 247 U. S. 201, in which the railroad sued in the United States District Court to recover charges published as required by the Interstate Commerce Act for disinfecting cars in which livestock was

shipped from points outside of Louisiana to New Orleans. The District Court dismissed the suit for want of jurisdiction. This Court reversed, holding at page 202:

> "Section 24 of the Judicial Code provides that regardless of amount involved District Courts shall have original jurisdiction 'of all suits and proceedings arising under any law regulating commerce.' The Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff in respect of every shipment. *Their duty and obligation grow out of and depend upon that act.*" (Italics added.)

At page 203 the Court further held:

> "The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved as required by Interstate Commerce Act; *result of the action necessarily depended upon construction and effect of that act.* (Italics added.)
>
> "We think the District Court had jurisdiction."

In *Turner Lumber Co. v. C., M. & St. P. Ry.*, 271 U. S. 259, 261, this Court held that a federal district court had jurisdiction of a suit to recover $40.00 demurrage on a car containing an interstate shipment, despite the small amount, "because the suit arises under a law regulating commerce. * * *"

The fact that the amounts sought to be recovered in the Thermoid case and the instant case were collected for *intrastate* rather than interstate transportation services does not oust the District Court's jurisdiction, since Section 13(4) of the Interstate Commerce Act expressly empowers the Commission to exercise federal jurisdiction over intrastate freight rates and thus undeniably to "regulate" *intrastate* commerce. It can not be denied that the Interstate Commerce Act is an Act of Congress

regulating commerce or that it empowers the Commission to prescribe intrastate rates in order to prevent unjust discrimination against interstate commerce. Section 13(4) of that Act regulates *intrastate* commerce, and when that power is exerted by the Commission, like the federal bills of lading act, it "supersedes all the regulations and policies of a particular State upon the same subject," *Adams Express Co. v. Croninger*, 226 U. S. 491, 505.

The federal nature of the instant controversy derives from the fact that the amounts sought to be recovered were collected under rates prescribed by federal authority under an Act of Congress regulating commerce. Eighty years ago this Court held in *Tennessee v. Davis*, 100 U. S. 257, at page 264:

> "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted."

The intrastate rates that are the sole cause of the controversy here "grow out of the legislation of Congress." They did not "grow out of" Utah law, nor do Utah laws create any restitution rights or other remedies with respect to intrastate rates prescribed by the Commission under "the legislation of Congress".

This federal jurisdictional consequence of the prescription of rates by federal authority was heretofore fully understood by the same Circuit Court of Appeals whose decision we seek to have reviewed by this Court. In *Bernstein Bros. Pipe & Mach. Co. v. Denver & R. G. W. R. Co.*, 193 F. 2d 441, that court sustained the jurisdiction of a District Court of an action by the railroad for additional transportation charges on interstate shipments, saying at page 444:

"It has been established since the decision of the Supreme Court in Louisville & N. R. R. Co. v. Rice, 247 U. S. 201, 202, 203, 38 S. Ct. 429, 62 L. Ed. 1071, that a suit to recover a freight undercharge arises under a law regulating commerce, since the duty to pay and the right and obligation to collect grow out of and depend upon the Interstate Commerce Act.

* * * * *

"Here, since the obligation to pay and the right and duty to collect arises solely by virtue of §§ 3(2) and 6(7), supra, of the Interstate Commerce Act, the cause of action sought to be enforced is created by and arises out of an Act of Congress regulating commerce.

"A tariff, so long as it is enforced, is, in respect to the rates named, to be treated as though it were a statute binding upon the carrier and shipper alike. Every question of the construction of an interstate tariff is a question of Federal law."

In *Allen v. New York, P. & N. R. Co.*, 15 F. (2d) 532, the Fourth Circuit Court of Appeals sustained the District Court in denying a motion to remand to a State court an action to recover payments by shippers alleged to be in excess of interstate charges authorized by the railroad tariffs. At page 533 the court held—

"* * * In the cases at bar, the shippers must recover, if at all, upon the rights given them by certain acts of Congress and proceedings of the Interstate Commerce Commission authorized thereby. It does not help the shipper that, had there been no such acts or proceedings, they could at common law have recovered from a common carrier any sums which had been unlawfully extorted from them; for in the cases which they now present the question whether there was any extortion, and, if so, how much, depends altogether upon the construction of the federally prescribed tariffs."

Federal jurisdiction of a suit for demurrage charges prescribed by the Interstate Commerce Commission on *intrastate* shipments was sustained in *Chicago, M., St. P. & P. R. Co. v. McCree & Co.*, 91 F. Supp. 57 (D. C. Minn.).

But for the fact that the rates against which restitution is sought were prescribed by the federal Commission under an Act of Congress there would be no controversy here, *Atlantic Coast Line R. Co. v. New York Casualty Co.*, 57 F. Supp. 31; and in testing the jurisdiction of the District Court, "[i]t is immaterial what rights the plaintiffs have at common law or by state statute," *Young & Jones v. Hiawatha Gin & Mfg. Co.*, 17 F. (2d) 193, 195.

III.

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court. While this Court's decision in *Atlantic Coast Line v. Florida*, supra, sustains the jurisdiction of a three-judge district court, which has upheld a Commission intrastate rate order, to adjudicate restitution claims *filed in that Court*, the decision does not consider or settle the question here (a) whether a federal district court which has upheld a Commission order prescribing intrastate rates has jurisdiction of restitution claims filed in a State court and removed to the district court, or the question (b) whether such restitution claims filed in a State court may not be removed to the federal district court which has upheld the Commission's order because the complaint states a claim on which the relief prayed "can be granted" by the State court in which the action was filed.

These questions are important not only to the parties in this case but also to railroads and shippers generally, particularly in view of the number of Commission orders

under Section 13(4) that are reviewed by the courts.[6] It is also of importance that these questions be settled by this Court because they involve an important area of judicial administration.

CONCLUSION

For the reasons above stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Counsel of Record
for Petitioners,
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Omaha 2, Nebraska.

JAMES H. ANDERSON,
BRYAN P. LEVERICH,
A. U. MINER,
S. N. CORNWALL,
WOOD R. WORSLEY,
Attorneys for Petitioners.

September, 1959.

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6 See cases discussed in the opinion dissenting from the majority decision from which the instant controversy emerges. *Pub. Service Comm'n* v. *United States*, 356 U.S. 421, 429-463.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on 9th day of September, 1959, I served, on behalf of all petitioners herein, the foregoing petition on the adverse parties by mailing copies in a duly addressed envelope with air-mail postage prepaid to their counsel:

Calvin L. Rampton, Esq.,
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Salt Lake City, Utah.

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Counsel of Record for Petitioners.
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Omaha 2, Nebraska.

APPENDIX

I. STATUTORY PROVISIONS INVOLVED.

The relevant provisions of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(3) and (4) are as follows:

> (3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.
>
> (4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or lo-

calities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: *Provided*, That upon the filing of any petition authorized by the provisions of paragraph (3) hereof to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Pertinent provisions of 28 U.S.C.A. are:

§ 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting

trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 6080—May Term, 1959

Structural Steel and Forge Company; The American Foundry and Machine Company; Island Ranching Company; Calvin L. Rampton; and Pugsley, Hayes, Rampton & Watkiss, a partnership,

Appellants,

v.

Union Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, The Western Pacific Company and Bamberger Railroad Company,

Appellees.

Appeal from the United States District Court for the District of Utah

---

(July 8, 1959)

Calvin L. Rampton for Appellants.

Elmer B. Collins and A. U. Miner (James H. Anderson, Bryon P. Leverich, S. N. Cornwall, Wood R. Worsley, Clair G. Anderson and E. G. Knowles were with them on the brief) for Appellees.

Before MURRAH, PICKETT and BREITENSTEIN, Circuit Judges.

MURRAH, Circuit Judge.

This is an appeal from an order of the District Court enjoining appellants, Utah intrastate shippers, from

prosecuting a state court class action against appellee railroads, to recover intrastate freight charges paid under an order of the Interstate Commerce Commission, which was ultimately vacated for further proceedings. See Public Service Commission of Utah v. United States, 356 U. S. 421.

The challenged stay order was entered in a removed action by other shippers similarly situated but with separate and distinct claims. As a stay of state court proceedings, the order can be justified only insofar as it is necessarily in aid of the exercise of federal court jurisdiction in the removed case. Section 2283, Title 28, U.S.C.A. See also Looney v. Eastern Texas R. R. Co., 247 U. S. 214; Clothing Workers v. Richman Bros., 348 U. S. 511.

Removability of the removed case was challenged on motion to remand in the trial court, and the point is again urged here. The appellees on the other hand invoke the well known rule against appealability of orders denying motions to remand. But this appeal is not from the order denying remand of the removed case. Instead, it is an appeal from an order granting injunctive relief in that case, and such orders are appealable under Section 1292, Title 28, U.S.C.A. In reviewing the issues raised on appeal from the injunctive order, we must inquire into the jurisdiction of the court to grant any such order. Riverbank Laboratories v. Hardwood Products Corp., 220 F. 2d 465; Willoughby v. Sinclair Oil & Gas Co., 188 F. 2d 902.[1] The basic question is therefore whether the case

1 Our case is distinguishable from In re Bear River Drainage District, 10 Cir., ——F.2d——, decided June 5, 1959, where the appeal sought review of an order in a case which had been remanded to the state court, leaving the Federal court without jurisdiction, thus rendering the appeal "a futile thing." See Hammond Hotel & Improvement Co. v. Finlayson, 7 Cir., 6 F.2d 446, 447. A remand order is not subject to review either directly or indirectly. Pacific Live Stock Company v. Lewis, 241 U.S. 440, 447.

was removable, for if not, there was no jurisdiction to aid or protect, and the stay order must surely fail.

The matter is presented on these relevant facts. Pursuant to a proceedings under Section 13(3)(4) of the Interstate Commerce Act, the Interstate Commerce Commission granted a 15 per cent increase in intrastate freight rates to railroads operating in Utah in conformity with the general level of interstate rates over the same routes. See Utah Intrastate Freight Rates & Charges, 297 I. C. C. 87. The Commission's order was sustained by a three-judge court in Public Service Commission of Utah v. United States, 146 F. Supp. 803, and the increased rates were thereupon put into effect. On appeal, however, the rate order was set aside and the cause remanded to the Interstate Commerce Commission for further proceedings in conformity with the opinion of the court. Public Service Commission of Utah v. United States, supra. Thermoid Western Company and four other similarly situated intrastate shippers thereupon brought a state court class action against the appellee railroads to recover various amounts alleged to have been paid by them pursuant to and during the time the order of the Interstate Commerce Commission was effective to increase intrastate rates in Utah.

The complaint alleged the order of the Interstate Commerce Commission increasing intrastate rates in Utah and its ultimate reversal by the Supreme Court on the grounds of insufficiency of the evidence to warrant Interstate Commerce Commission jurisdiction of intrastate rates in Utah. It was then alleged that the order of the Interstate Commerce Commission raising intrastate rates in Utah was void; that any freight rates and charges assessed and collected by the appellee carriers from the plaintiff shippers in intrastate commerce in Utah over and above those prescribed by the tariff filed with and approved by the Public Service Commission of Utah were unlawful. The plaintiff shippers prayed accordingly.

The railroad defendants timely removed the action to the United States District Court of Utah on their allegation to the effect that the action arose under an act of Congress regulating commerce, and as such was a civil action or proceedings of which the District Court had original jurisdiction. The motion to remand was denied and the trial of the case was "continued without date pending outcome of proceedings before the Interstate Commerce Commission."

Thereafter the appellant Structural Steel and Forge Company and other similarly situated intrastate shippers, brought the class action in the Utah state court, the prosecution of which was enjoined by the order in the removed Thermoid case, from which this appeal is taken. The suit was against the same railroads to recover rate charges assessed and collected under authority of the vacated order of the Interstate Commerce Commission as in the removed case. Without making any reference to the order of the Interstate Commerce Commission, the complaint merely alleged that the rates charged and collected while the order of the Interstate Commerce Commission was in effect were in excess of those provided in the schedules of the defendant railroads on file with the Public Service Commission of Utah and therefore excessive and illegal, and that the complainants were entitled to recover such excessive charges.

Without attempting to remove the latter action to the federal court, the railroads in the removed case moved to enjoin the parties from prosecuting the state court action, on the grounds that the attorneys in the removed action had also filed the subsequent class action in the state court and had threatened to file numerous like suits; that said suits were "unnecessary, vexatious, burdensome, and would cause defendants irreparable damages in expenses they would necessarily have to incur

in defending such action, and would circumvent, impair and render futile the jurisdiction of this court in the instant case."

Upon statement of counsel, the court seemed to think that the filing of the state court litigation as a class action with an invitation to other parties similarly situated to intervene, was a plan and scheme to frustrate federal court jurisdiction. These considerations apparently prompted the court to enter the challenged injunctive order. At the bar of the court and by subsequent pleadings, the appellants have waived any defect in service and entered their appearance in the action for the purpose of testing the jurisdiction and propriety of the court to enjoin the state court litigation.

Except as otherwise expressly provided, "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." §1441, Title 28, U.S.C.A. And, when this suit was commenced the district courts had "original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." §1331, Title 28, U.S.C.A. And, the district courts also "have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *" regardless of the amount in controversy or the citizenship of the parties. §1337, Title 28, U.S.C.A.

The latter statute is invoked as a basis for removability. But whether it is made to depend upon the "general" or the "special" statute, the long established

test is whether the stated claim on which relief can be granted really and substantially involves a dispute or controversy in respect of the validity, construction or effect of federal law, upon the determination of which the result depends. Otherwise stated, "A right or immunity created by the laws of the United States must be an essential element of the plaintiff's cause of action, and the right or immunity must be such that it will be supported if one construction or effect is given to the laws of the United States and will be defeated if another construction or effect is given. And, a genuine and present controversy of that kind must be disclosed upon the face of the complaint, unaided by the petition for removal or the answer." Anderson v. Bingham & Garfield Ry. Co., 169 F. 2d 328, 14 A. L. R. 2d 987. See also cases collected 14 A.L.R. 2d 992; 13 A.L.R. 2d 390; 12 A.L.R. 2d 5. All doubts concerning federal court jurisdiction must be resolved against it. Skelly Oil Co. v. Phillips Co., 339 U. S. 667. We of course know the rule. Difficulty comes only with its application to the complaint.

Stripped of its irrelevancies, the removed claim is that the defendant railroads exacted a rate for intrastate shipments in excess of those established and on file with the competent state regulatory body, and the prayer is for restitution of the same. In substance, it is the same as the Structural Steel claim in the state court. Surely both complaints state a claim on which relief can be granted under the laws of the State of Utah, i. e., the right not to be required to pay a higher rate on intrastate shipments than that prescribed by applicable state law, rule or regulation. The reference then to the void or vacated order of the Interstate Commerce Commission as a basis for the charges, was not an essential ingredient for the claim for restitution. As a gratuitous anticipation of a defense founded in federal law, it will not suffice to confer federal court jurisdiction. Tennessee v.

Union & Planters Bank, 152 U. S. 454; Gully v. First National Bank in Meridian, 299 U. S. 109; Skelly Oil Co. v. Phillips Co., 339 U. S. 667; City of Monroe v. Detroit, M. & T. S. L. Ry., 257 Fed. 782; Venner v. New York Central R. Co., 293 Fed. 373.

But even though a valid rate order does emerge to ultimately condition the right of recovery in these actions, the claim does not for that reason arise out of an act of Congress regulating commerce. For, as the matter now stands, the rate order has been vacated and the case recommitted to the Interstate Commerce Commission for further proceedings on jurisdictional fact. And, it does not lie within the competence of the federal court in the removed Thermoid case, or the state court in the Structural Steel case, to determine and promulgate applicable rates under any act of Congress regulating commerce. That essential function has been committed exclusively to the Interstate Commerce Commission with prescribed judicial review unavailable here. Indeed, this case has been continued pending the outcome of that course of litigation. And so at most, federal law lurks in the background to determine the result of this litigation. Moreover, any final order establishing prevailing rates after further hearing before the Interstate Commerce Commission may very well be prospective in effect, leaving the subject matter of these actions unsupported by any valid order. In which event, the right to prevail would depend upon traditional notions of equity as in Atlantic Coast Lines v. Florida, 295 U. S. 301—not federal law. Jurisdiction wise, our case is wholly unlike Atlantic Coast Line v. Florida, supra; and United States v. Morgan, 313 U. S. 409, where restitution was sought in a federal court with conceded jurisdiction to review the administrative rate-making process.

We conclude that the Thermoid case was improperly removed to the federal court and that the court was therefore without jurisdiction to enter the stay order. The case is accordingly reversed and remanded, with directions to grant the motion to remand.

III. JUDGMENT OF THE COURT OF APPEALS.

Judgment.

Twenty-ninth Day, May Term, Wednesday, July 8th, 1959.

Before Honorable Alfred P. Murrah, Honorable John C. Pickett and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with directions to grant the motion to remand, and that Structural Steel and Forge Company, The American Foundry and Machine Company, Island Ranching Company, Calvin L. Rampton and Pugsley, Hayes, Rampton & Watkiss, a partnership, appellants, have and recover of and from Union Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, The Western Pacific Company and Bamberger Railroad Company, appellees, their costs herein and have execution therefor.

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SEP 25 1959
JAMES R. BROWNING, Clerk

No. 387

In the Supreme Court of the United States

October Term, 1958

UNION PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, THE WESTERN PACIFIC (RAILROAD) COMPANY, and BAMBERGER RAILROAD COMPANY,

Petitioners,

vs

STRUCTURAL STEEL AND FORGE COMPANY, THE AMERICAN FOUNDRY AND MACHINE COMPANY, ISLAND RANCHING COMPANY, CALVIN L. RAMPTON, and PUGSLEY, HAYES, RAMPTON & WATKISS, a Partnership,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CALVIN L. RAMPTON
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UNION PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE WESTERN PACIFIC (RAILROAD) COMPANY; and BAMBERGER RAILROAD COMPANY,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTION

This is not a proper case for certiorari. No new or otherwise undecided question is presented. The Circuit Court has merely followed a rule well established by the decisions of this Court. The question involved in this case is whether or not jurisdiction of the action lies with the Federal courts under the provisions of 28 U.S.C.A. 1337 or under the "Federal

Question" provision of 28 U.S.C.A. 1441. The Circuit Court held that jurisdiction did not lie with the federal courts where the claim did not arise under the Constitution, treaties or laws of the United States even though a defense under federal law might properly be asserted. This even though the plaintiff in his complaint anticipated and negatived a probable defense under federal law. *Gully v. 1st National Bank*, 299 U.S. 109; *Skelly Oil Company v. Phillips Petroleum Company*, 399 U.S. 667.

STATEMENT OF FACT

The railroads operating within the state of Utah obtained an order from the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act raising Utah intrastate rates and charges. This order was attacked in the United States District Court for the District of Utah. The Three Judge District Court refused to set aside the Interstate Commerce Commission order. An appeal was taken to this Court, which appeal resulted in a reversal of the District Court and the setting aside of the Interstate Commerce Commission order. In the interim, however, the railroads, for a period of two years, had charged rates higher than the rates approved by the Public Service Commission of Utah.

Section 54-3-7 U.C.A., 1953 provides in part as follows:

> *"Charges not to vary from schedules—Exception—Refunds and rebates forbidden.* — Except as in this chapter otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished or to be furnished, or for any service rendered, or to be rendered, than the rates, tolls, rentals and charges applicable to such products or commodity or service as specified in its schedules on file and in effect at the time; * * * * "

Counsel for respondents herein instituted suit under this section in the Utah state courts on behalf of Thermoid Company and others to recover the overcharges. This case was removed to the United States District Court and a motion to remand denied. Counsel then instituted another suit in the state courts on behalf of Structural Steel & Forge Company and others against the railroads for recovery of this overcharge. The United States District Court issued an injunction against counsel and the Structural Steel group restraining this action. An appeal was taken to the Tenth Circuit. The Circuit Court reversed the district court, ordered the Thermoid case remanded and dissolved the injunction in the Structural Steel case. It is this decision of the Circuit Court to which certiorari is sought.

The complaints in the Thermoid case and in the Structural Steel case are almost identical. The only difference is that in the Thermoid case counsel mentioned the Interstate Commerce Commission proceedings and alleged that they were of no effect, thus anticipating and negativing a defense. In the Structural Steel case, no mention of this possible defense was made.

ARGUMENT

There is no diversity of citizenship involved in this case. Therefore, if the cases were removable to the United States District Court, it had to be upon the basis that the claim arose under the Constitution, treaties, or laws of the United States. Such was not the case. The claim arose out of the statute of the State of Utah above quoted. The laws of the State of Utah provide that no charge shall be made for services of a public carrier higher than the approved rates on file with the Public Service Commission of Utah. The railroads did charge

more than the rates on file with the Utah commission, therefore, under the state law, a right of action existed in the rate-payers to recover the excess.

Whether the Interstate Commerce Commission order which was subsequently set aside by this Court protects the railroads in charging the higher rate prior to the time the order was set aside, is a matter which will have to be determined when the case comes on for trial on its merits. That defense can be raised in the state courts as well as the federal courts. However, whatever effect the Interstate Commerce Commission order may have had, such is a matter of defense and is not a part of the plaintiff's cause of action. This, of course, does not mean that the applicability of that defense can never be reviewed by the federal courts. Review of the highest state court holding can be had in this Court provided the matter is held adversely to the railroads on trial and on appeal to the highest state court. However, as only the defense and not the plaintiffs' right of action depend upon federal law, original jurisdiction does not lie with the United States District Court under the provisions of either 28 U.S.C.A. 1337 or 28 U.S.C.A. 1441.

In the Brief in support of their Petition, the petitioners have cited some 17 cases in support of their arguments. All of the cases with the exception of *Atlantic Coast Line v. Florida*, 295 U.S. 301, are clearly distinguishable upon the common ground that in those 16 cases the railroad overcharges or demurrage charges of which recovery was sought were applicable to interstate rates, not intrastate rates. The interstate rates in question were under the jurisdiction of the Interstate Commerce Commission and were regulated by federal law. If any right of recovery existed in the plaintiff in any of those cases, it existed by virtue of federal statutes. Those cases are

not cases such as the instant case where the right of action depended upon a state law even though a federal law might be raised in defense.

Because *Atlantic Coast Line v. Florida*, supra, has certain superficial resemblances to the instant case, a word should be said about that case. In that case as here, the Interstate Commerce Commisson had raised the rates under Section 13 and subsequently the order raising the rates had been set aside. The shippers in that case applied to the federal court in a supplemental proceeding to the very action which had resulted in the setting aside of the Interstate Commerce Commission order. They alleged that because the District Court has erred in not setting aside the Interstate Commerce Commission order when application was first made the shippers had been required to pay additional freight charges. Therefore, in equity they alleged, the error of the District Court having caused their loss, the District Court should issue a judgment making them whole. A question of jurisdiction does not appear to have been raised in that case. However, this Court on appeal did hold that the equities of the situation did not recommend recovery and therefore denied reparations. This matter was thoroughly considered by the Circuit Court which pointed out:

> "The right to prevail would depend upon traditional notions of equity as in Atlantic Coast Lines v. Florida, 295 U.S. 301—not federal law. Jurisdiction wise, our case is wholly unlike Atlantic Coast Line v. Florida, supra; and United States v. Morgan, 313 U.S. 409, where restitution was sought in a federal court with conceded jurisdiction to review the administrative rate-making process."

If their action is based upon a federal statute, let the petitioners tell us which one it is. It is certainly not based

upon Section 13 of the Interstate Commerce Act. That Act at best stands in the background as a possible defense for the railroads. Section 13 makes no provision for reparations if an order is set aside. So far as we have been able to determine the federal law may be searched in vain for any provisions which give us a basis for recovery. That basis is found in the Utah state law, and the jurisdiction of the action belongs in the Utah state courts. If in fact the voided order of the Interstate Commerce Commission constitutes a defense, the Utah courts are as well able as the federal courts to apply such defense. Furthermore, if the Utah courts interpret the federal law improperly in this regard, such holding can be reviewed in this Court.

CONCLUSION

Here we have no new or novel question presented, but a question which has been decided many times by this Court, as is pointed out in the opinion of the Circuit Court. We have no conflict between the Circuits. The petitioners have not pointed to a single case from any other circuit which upholds the original jurisdiction of the United States courts to entertain an action to recover overcharges or intrastate freight rates. Nor do we have here a case where the Circuit has failed to follow prior decisions of this Court. Their decision is based squarely upon precedent from this Court. The Petition for Certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court U.S.

REPLY TO RESPONDENT-

INTERVENOR'S

OPPOSITION

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No. 385

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNION PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE WESTERN PACIFIC [RAILROAD] COMPANY; and BAMBERGER RAILROAD COMPANY,

Petitioners,

vs.

STRUCTURAL STEEL AND FORGE COMPANY; THE AMERICAN FOUNDRY AND MACHINE COMPANY; ISLAND RANCHING COMPANY; CALVIN L. RAMPTON; and PUGSLEY, HAYES, RAMPTON & WATKISS, a Partnership,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

o———o———o

UNION PACIFIC RAILROAD COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE WESTERN PACIFIC [RAILROAD] COMPANY; and BAMBERGER RAILROAD COMPANY,

Petitioners,

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STRUCTURAL STEEL AND FORGE COMPANY; THE AMERICAN FOUNDRY AND MACHINE COMPANY; ISLAND RANCHING COMPANY; CALVIN L. RAMPTON; and PUGSLEY, HAYES, RAMPTON & WATKISS, a Partnership,

Respondents.

o———o———o

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

o———o———o

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

o———o———o

Respondents' brief in opposition fails to meet the points raised in support of the petition for certiorari. Additionally, the Court's attention should be called to some of the statements made by respondents which are incorrect and may leave an erroneous impression.

ARGUMENT

1. FEDERAL JURISDICTION WAS RAISED AND CONSIDERED BY THIS COURT IN ATLANTIC COAST LINE V. FLORIDA, 295 U. S. 301.

Attempting to escape the impact of this Court's decision denying restitution under practically identical cir-

cumstances in the *Florida* case, respondents state at page 5 of their brief in opposition that "[a] question of jurisdiction does not appear to have been raised in that case." Why counsel for respondents would make this assertion is incomprehensible in view of the facts stated at pages 303-304 under "Statement of the Case" that—

> "* * * After the case had been argued at this Term, the Court called for reargument upon the following questions:
>
> "(1) Whether the District Court had jurisdiction to award restitution or should exercise such jurisdiction in a case of this character relating to intrastate rates. (2) If the District Court had such jurisdiction and should exercise it in a case of this character relating to the revenue needs of the carrier, what should be the measure of an award of restitution. And (3) In such an inquiry, what effect, evidentiary or otherwise, should be attributed to the proceedings before, and findings of, the Interstate Commerce Commission."

The *Florida* case is discussed and the questions just quoted, on which this Court expressly called for reargument, are set forth at pages 15-16 of the petition for certiorari, but they are repeated here to emphasize the apparent but wholly untenable view of counsel for respondents that, although this Court itself called for reargument upon the specific question whether the District Court had jurisdiction, the Court, nevertheless, carelessly or negligently proceeded to consider and deny the restitution claims in that case without regard to its own jurisdiction or the jurisdiction of the District Court. Jurisdiction is never ignored or treated so cavalierly by this Court, *United States v. Corrick*, 298 U. S. 435, 440. The Court's action and decision in the *Florida* case plainly sustains the jurisdiction of the federal District Court in the instant cases.

2. THE DECISION BELOW THAT THE RESTITUTION CLAIMS DID NOT ARISE UNDER AN ACT OF CONGRESS REGULATING COMMERCE AND THAT FEDERAL JURISDICTION WAS LACKING BECAUSE "RELIEF CAN BE GRANTED UNDER THE LAWS OF THE STATE OF UTAH" IS NEW, NOVEL AND IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

Respondents conclude at page 6 of their brief in opposition that the petition presents no new or novel question and no conflict between circuit courts of appeal, but presents a question many times decided by this Court as pointed out in the opinion of the court below. But neither the opinion below nor the brief in opposition cites any decision of this Court or any other court holding that a suit to recover intrastate rates prescribed by the Interstate Commerce Commission is not an action arising under an Act of Congress regulating commerce, or that federal jurisdiction is lacking if the relief sought can be granted by the state court in which the suit is filed.

Exhaustive research has disclosed no decision denying federal jurisdiction upon such ground or grounds. On the contrary, this Court's decision in the *Florida* case necessarily sustained federal jurisdiction, unless the wholly impermissible assumption of counsel for respondents be indulged that even after calling reargument upon the specific question of federal jurisdiction this Court proceeded to decide the merits of the case and dismiss the restitution claims in complete disregard of its own jurisdiction and that of the District Court.

The decision below conflicts with decisions of this Court and, indeed, a decision of the Tenth Circuit Court of Appeals itself, and of the Fourth Circuit cited and discussed at pages 16-20 of the petition for certiorari.

Those decisions plainly hold that suits to recover freight rates prescribed pursuant to the Interstate Commerce Act by an order of the Commission are within the original jurisdiction of federal district courts because they are actions or proceedings which arise under an Act of Congress regulating commerce, within the express jurisdictional provision of 28 U. S. C. § 1337. The suits here involved are within such federal jurisdiction because they seek to recover rates prescribed by the Commission under Section 13 of the Interstate Commerce Act,—an act of Congress which plainly authorizes the Commission to regulate and prescribe intrastate rates.

Respondents admit at page 4 of their brief in opposition that any right of recovery of *interstate* rates exists "by virtue of federal statutes" because they are under the jurisdiction of the Interstate Commerce Commission and are regulated by federal law; but quite inconsistently and erroneously they deny that any right to recover *intrastate* rates, similarly under jurisdiction of and prescribed by the Interstate Commerce Commission and regulated by Section 13 of the Interstate Commerce Act, exists by virtue of federal statutes, but depends upon the Utah state laws. Such illogical perversion of statutory provisions can not stand, for the original jurisdiction conferred upon federal district courts of actions arising under any Act of Congress regulating commerce is not limited or restricted to the regulation of *interstate* commerce or rates, but clearly embraces any "commerce" regulated by any Act of Congress. Federal jurisdiction does not, as respondents contend, depend upon whether the commerce so regulated or the rate prescribed is interstate or intrastate, but upon the fact that the rate is prescribed by the federal Commission under an Act of Congress authorizing it to regulate com-

merce regardless of whether the commerce is interstate or intrastate.

This Court has long since observed the existence of concurrent jurisdiction of federal courts with state courts in certain types of actions created by federal statutes, the jurisdiction of state courts "being, of course, subject to the right to remove the suit into the proper court of the United States," *Robb v. Connolly*, 111 U. S. 624, 637; *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121, 132; *Galveston, H. & S. A. Ry. v. Wallace*, 223 U. S. 481, 490. But the existence of such concurrent jurisdiction has never been permitted to interfere with a defendant's "unqualified and unrestrained right to have the case transferred to the Federal Court." *Insurance Company v. Morse*, 20 Wal. (87 U. S.) 445, 454.

In *Penn. R. Co. v. Ills. Brick Co.*, 297 U. S. 447, the Interstate Commerce Commission had prescribed intrastate freight rates for Illinois under Section 13 of the Act. The Illinois Commerce Commission attempted to reduce certain of the rates by awarding reparation to a lower rate level, and the Illinois courts sustained the state action. Rejecting this state interference with the rates prescribed by the Interstate Commerce Commission, this Court said at page 460—

> "* * * Save as the rate so prescribed might be dealt with under federal law, the carriers were bound to collect the charges based upon them. By the Interstate Commerce Act and that order, *the State was divested of jurisdiction*, by specific order, award of reparation *or otherwise*, to reduce the charges based on the intrastate rates so established." (Emphasis added.)

3. FEDERAL JURISDICTION EXISTS UNDER 28 U. S. C. § 1337 AND PROVISIONS OF THE INTERSTATE COMMERCE ACT.

Respondents assert at page 6 of their brief in opposition that "the federal law may be searched in vain for any provisions which give us a basis for recovery," that such basis is found in the Utah state law and jurisdiction belongs in the Utah state courts. They further assert that Section 13 of the Act makes no provision for reparations if an order is set aside; but neither does the section of the Utah Code on which respondents rely (p. 2, "Brief in Opposition * * *") as their basis for recovery in the state court.

Respondents' confusion necessitates spelling out again the statutory provisions which confer federal jurisdiction. Title 28 U. S. C. § 1337 confers original jurisdiction on district courts of the United States of any civil action or proceeding arising under any Act of Congress regulating commerce. The Interstate Commerce Act is an Act of Congress regulating commerce. By virtue of its authorization in Sections 6 and 15(1) the Interstate Commerce Commission is empowered to regulate and prescribe interstate freight rates of carriers subject to that Act, and is expressly and specifically authorized by the provisions of Section 13(4) of that Act to prescribe and regulate *intrastate* rates to remove unjust discrimination against interstate commerce, and that Section divests the states of jurisdiction over intrastate rates by the requirement that the rates so prescribed by the Commission shall be observed, "the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 6(1) of that Act requires railroads to file tariffs of their rates and charges, and Section 6(7) makes

it unlawful for a railroad to transport passengers or property unless such rates and charges have been filed, and provides that "nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *."

Section 8 of the Act provides that railroads shall be liable to any person damaged because of a violation of the provisions of the Act by such carrier.

Section 9 authorizes a person so damaged to bring suit for recovery of the damages in "any district court or circuit court of the United States of competent jurisdiction; * * *."

Sections 16(3)(b) and (c) provide for filing of complaints with the Commission for damages and for recovery of overcharges through the filing of actions at law, and Section 16(3)(g) describes "overcharges" to mean charges in excess of those applicable under the tariffs lawfully on file with the Commission.

Section 22(1) provides that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies; * * *."

In the instant suits respondents seek to recover "overcharges" amounting to the difference between the rates prescribed by the Interstate Commerce Commission and rates previously filed with the Utah commission but superseded by the federally prescribed rates which are in excess of the state rates previously in effect. It will be noted

that the overcharge for which recovery is provided in Section 16(3)(c), as defined in Section 16(3)(g), is the same as the provision of the Utah statute on which respondents rely as the basis for recovery in the state courts.

In short, the Interstate Commerce Act sets up comprehensive machinery requiring the filing or prescription of rates by the Commission and strict adherence thereto, as well as for actions at law in the federal district courts for any damage suffered by a shipper and for actions at law to recover any greater or different amount for transportation service than that specified in the tariffs. When Section 13 was added in 1920 expressly authorizing the Commission to prescribe intrastate rates there was no necessity for repeating in that Section the provisions for recovery of overcharges or amounts in excess of intrastate rates prescribed by the Commission.

But, as pointed out at pages 12-14 of the petition for certiorari and contrary to the statement at pages 3 and 4 of the brief in opposition that the railroads charged more than the rates on file with the Utah commission, the railroads collected only the exact rates prescribed by the Interstate Commerce Commission and on file and in effect at the time the transportation service was performed and there is no allegation to the contrary in the complaints nor any contention by respondents that the railroads collected amounts in excess of the rates so prescribed by the Commission. As those federally made rates necessarily superseded and suspended all previous intrastate rates approved by the Utah commission, there were no state-

approved rates on file with the Utah commission and in effect at the time the transportation service was performed.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1959.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 30th day of September, 1959, I served, on behalf of all petitioners herein, the foregoing petition on the adverse parties by mailing copies in a duly addressed envelope with air-mail postage prepaid to their counsel:

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